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April 26, 2007

The Honorable Gregory M. Sleet  
United States District Court  
for the District of Delaware  
844 North King Street  
Wilmington, DE 19801

VIA E-FILING

Re: *Telcordia Technologies, Inc. v. Lucent Technologies, Inc.*  
C.A. No. 04-875 (GMS)

*Telcordia Technologies, Inc. v. Cisco Systems, Inc.*  
C.A. No. 04-876 (GMS)

Dear Judge Sleet:

At the pretrial conference, Your Honor stated that you intended to have “three [peremptory challenges] a side.” (March 30, 2007 Tr. at 195). I write on behalf of defendant Cisco to seek clarification and request that each defendant get three challenges.

Pursuant to 28 U.S.C. § 1870, “each party shall be entitled to three peremptory challenges,” unless the Court considers “several defendants . . . as a single party.” Here, Cisco and Lucent are not a “single party.” Cisco and Lucent are unaffiliated companies that were sued in separate actions that have been consolidated. They are competitors with many differences. The claims against them are based on different accused products and different facts. Cisco and Lucent have separate counsel. Under the circumstances, they each should get three peremptory challenges.

As set forth in 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2483 (2d ed. 1995) (emphasis added):

[I]f consolidation results in multiple parties on one or both sides of the action, *each party in the consolidated action is entitled to three challenges.*

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*See, e.g., Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 293-94 (1892) (holding that lower court erred in only allowing three peremptory challenges for three defendants consolidated for trial because each had the right to three challenges and consolidation did not divest them of their individual rights); *Allen v. United Mine Workers*, 30 F.R.D. 41, 46 (E.D. Tenn. 1962) (“[c]onsolidation for joint trial shall not deprive the parties of the right to their peremptory jury challenges in each case”). *See also Tidemann v. Nadler Golf Car Sales, Inc.*, 224 F.3d 719, 725 (7th Cir. 2000) (affirming district court’s grant of three peremptory challenges for each defendant); *Nehring v. Empresa Lineas Maritimas Argentinas*, 401 F.2d 767, 767-68 (5th Cir. 1968) (holding district court did not abuse its discretion in allowing each defendant three challenges).

Thus, in *Stambler v. RSA Security Inc. and Verisign, Inc.*, C.A. No. 01-65 (SLR) (D. Del. Feb 24, 2003) (Ex. A), as here, there were two unaffiliated defendants, each represented by its own counsel. Chief Judge Robinson granted “three peremptories for each” party, seating 19 potential jurors, and explaining that out of “19 names, that’s 10 jurors and then three peremptories for each side [*i.e.*, each party].” (Ex. A at 35, 82). Cisco requests that the same procedure be followed here, and that Cisco and Lucent each get three peremptory challenges.

Respectfully,

  
Jack B. Blumenfeld (#1014)

JBB/dlb

Enclosure

cc: Clerk of Court (by hand; w/ encl.)  
Steven J. Balick, Esquire (by e-mail and hand; w/ encl.)  
John W. Shaw, Esquire (by e-mail and hand; w/ encl.)  
John Williamson, Esquire (by e-mail; w/ encl.)  
Steven Cherny, Esquire (by e-mail; w/ encl.)  
Edward R. Reines, Esquire (by e-mail; w/ encl.)

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# EXHIBIT A

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PROCEEDINGS

(Proceedings commenced at 8:30 a.m.)

THE COURT: Good morning.

We have a lot to discuss. We will start out by my saying this. First of all, I want to apologize for the confusion. Unfortunately, when you have got back-to-back patent trials, sometimes it is difficult to focus on the next one coming when you are still in the midst of one, and I didn't finish my last one until Wednesday of last week. So I apologize for not focusing on this sooner, to give you a head's up and give us a chance to better discuss this.

The second thing I want to say, however, is: Having as many patent cases as we do in this Court, we have come to realize that our most important function as Judges is to make sure that complex patent cases are understandable to a lay jury. Given the complex nature of this technology, at least I find it very difficult to understand, and the fact that we did have multiple parties and multiple products, I believed that sequencing and bifurcation was an appropriate way to limit the issues and, therefore, have a better chance of a jury

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1 actually understanding the landscape and to make more  
2 meaningful decisions based on the evidence presented.

3 Since making that decision, however, I have  
4 had some second thoughts, based primarily on the letter  
5 that plaintiffs sent and I received on Friday. And that  
6 second thinking is focused on the fact that plaintiff has  
7 represented that the infringement issues in this case are  
8 not so much based on each defendant's products but on an  
9 industry protocol. And, therefore, there would be a great  
10 deal of overlap which would be inefficient and there would  
11 be a chance of inconsistent verdicts. That does cause  
12 some concern.

13 So I am having second thoughts about having  
14 two infringement cases. I still believe that it is  
15 appropriate to have two juries, one for infringement and  
16 one for validity. But I am thinking that it is  
17 inefficient and there is a chance of inconsistent verdicts  
18 if, in fact, the focus of the infringement evidence is on  
19 protocol and not on the products that you all threw at me.

20 By the same token, if it really is on protocol  
21 and not on each defendant's 30 or 40 products, it seems to  
22 me only appropriate to reduce the number of products to a  
23 manageable, representative number, so that the jury isn't  
24 confused by the fact that the evidence is on a protocol  
25 and yet they are asked to find infringement on 30 or 40

## Jury Trial - Volume A

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Monday, February 24, 2003

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1 Well, I have to make a decision for better or  
2 worse. I am not sure what it should be at this point. I  
3 would like counsel for VeriSign -- I am going to take a  
4 few minutes. It would probably help me to have copies of  
5 the expert reports.

6 MR. WHITNEY: We have a set here.

7 THE COURT: In the meantime I want VeriSign's  
8 counsel to lot a the jury pool and decide whether there  
9 is any way during the day today we can at least select  
10 the jury in case I decide to go forward with one trial.  
11 And I will see if I can determine from something whether  
12 one infringement trial or two is appropriate, based on  
13 the actual evidence that is going to be presented. That  
14 is the decision.

15 MR. KOVALICK: Just to point out for you, at  
16 the end of the Mr. Tygar report, that is where he breaks  
17 down the positions for VeriSign on the pay flow products,  
18 some of the payment techniques.

19 THE COURT: Fine.

20 Let's make sure VeriSign has the information  
21 it needs. Let me take 15 minutes or so to look through  
22 these and I will come back with a decision momentarily.

23 (Short recess taken.)

24 ---  
25

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1  
2 (Court resumed after the recess.)  
3

4 THE COURT: All right. I have reviewed the  
5 expert reports, and it is clear to me that much of the  
6 case is going to be on the SSL protocol. If you look at  
7 the expert reports, probably 90 to 95 percent of the  
8 reports have to do with the protocol and not with individual  
9 products. So I have decided that plaintiff's position is  
10 the more correct one. That, although there is going to be  
11 jury confusion, I believe there may be jury confusion or a  
12 risk of jury confusion is the proper way of saying it,  
13 because there are different products and different  
14 defendants. We have made some efforts to help that by  
15 splitting up the infringement and the validity issues.  
16 And that's I think all we can do at this stage.

17 So the remaining question is if we're going to  
18 go forward with both defendants in the infringement case,  
19 is whether VeriSign is going to be ready to pick a jury  
20 today. We won't go forward with the presentation of  
21 evidence because, clearly, I've made my decision too late  
22 in the day to do that. But I certainly don't want to,  
23 even though I really do hate to bring a jury back tomorrow.  
24 That doesn't speak well for the Court. On the other hand,  
25 I want to make sure VeriSign will be ready to select and

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1 that we have the best information we can have, so I need  
2 to have VeriSign's counsel let me know what is going on.

3 MR. KOVALICK: Your Honor, I'm not sure I  
4 quite understood what you were saying. You were saying  
5 you don't want to pick a jury today.

6 THE COURT: I want to pick a jury today, but  
7 we wouldn't go forward with any opening statements or the  
8 presentation of evidence today. I would like to get  
9 through jury selection sometime today because it's -- well,  
10 it's just very inefficient and inconsiderate to bring a  
11 panel in and not do anything with them for a day.

12 MR. KOVALICK: I appreciate that.

13 We've discussed it with our client and we  
14 would be prepared to pick a jury for today.

15 THE COURT: All right.

16 MR. KOVALICK: I'm hoping we can get maybe  
17 three peremptories.

18 THE COURT: Yes, I have three peremptories for  
19 each. What we need to do, and you can just hand-write in,  
20 we updated the parties and the proposed witnesses and the  
21 attorneys based on the information RSA gave us, but you  
22 need to hand-write in whatever other witnesses and  
23 attorneys, et cetera, so we can update voir dire.

24 The other thing I wanted to discuss with you  
25 is the issue of using the little bus tour tape instead of

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1 my giving my preliminary instructions. I saw it on Friday  
2 over our lunch. And I thought -- I mean it was a little  
3 silly, but I thought it was pretty good and certainly  
4 more helpful than the preliminary jury instructions I  
5 have been using. I would show them the whole thing because  
6 I intend to tell them that the defendants have asserted  
7 that the patents are invalid; just that they're not going  
8 to be concerned with that. And the tape, I think it's  
9 actually 14 minutes having to do with a walk-through and  
10 infringement and about two minutes maybe of the validity  
11 issue maybe. I don't even think it's that.

12 So that's another issue that we should  
13 address before we bring a jury up. I think it should be  
14 the Court presenting it to educate the jury, not any of  
15 the parties presenting it. The plaintiff is the one who  
16 proposed it, so I assume they have no objection.

17 MS. NOREIKA: Correct, your Honor.

18 THE COURT: So anything from the defendants?

19 MR. KOVALICK: I think we have talked and we  
20 would be amenable as well.

21 THE COURT: All right. Well, let me give you  
22 some time to update the voir dire and I'm also thinking  
23 about having ten jurors instead of eight. The last patent  
24 trial with the weather delays we had, we were risking  
25 getting below six, having selected eight for a two week

## Jury Trial - Volume A

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1 numbers when we excuse them. Let me go talk to my staff  
 2 to make sure we have numbers and I'll come back to and  
 3 make sure our numbers and names correspond.  
 4 (The Court and Deputy Clerk conferred.)  
 5 THE COURT: Okay. Blackwelder is 2, Farley  
 6 is 7, Humes is 15, Johnson is 16, Kelleher is 17, Krewson  
 7 is 19, Pierce is 26, Powell is 27, Raffle is 28 and  
 8 Williams is 32.  
 9 MS. NOREIKA: Right.  
 10 THE COURT: All right. Are there any other  
 11 applications for excuses for cause, or are there objections?  
 12 MS. NOREIKA: I think we would move to exclude  
 13 for cause Mr. Tolbert. I think since he read about  
 14 patents, I think he would have a partial view in the  
 15 administration of patents.  
 16 MR. LEE: Well, your Honor, it would depend  
 17 upon what the evidence said. If we're starting to excuse  
 18 people on that basis, then we should excuse the gentleman  
 19 who said all of his relatives have patents and he thinks  
 20 he should be entitled to get for what you get for them.  
 21 THE COURT: They counterbalance each other.  
 22 MR. LEE: Right.  
 23 THE COURT: Anything else for the record?  
 24 MR. KOVALICK: All I heard him say was he has  
 25 an opinion and he is willing to listen to the evidence.

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1 THE COURT: Well, what we'll do is we'll take  
 2 these numbers out of the box, shuffle them up, draw out  
 3 19 names, that's 10 jurors and then three peremptories  
 4 for each side. That's the list that you would be striking  
 5 from. The first 10 that are left after you are done will  
 6 be our 10 jurors.  
 7 MR. LEE: Great.  
 8 THE COURT: Okay. Thank you so much, counsel.  
 9 (End of sidebar conference.)  
 10 ---  
 11 THE COURT: All right. We have another  
 12 problem. We had three jurors that we listed as absent  
 13 and again we're not sure whether we have the right names  
 14 and numbers. We had an Alycia Benson as absent. Is she  
 15 in fact here?  
 16 All right. We had a Delores Fierro as absent.  
 17 Is that person here?  
 18 And finally, we had a Walter Taylor as absent.  
 19 Is he, in fact, here?  
 20 So does that help us? All right.  
 21 THE DEPUTY CLERK: Juror No. 23, please move  
 22 to the other side of the room, taking the first row, the  
 23 first seat.  
 24 Juror No. 18, please go in next to Juror No.  
 25 23.

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1 Juror No. 33, please move to the other side of  
 2 the room, the first row.  
 3 Juror No. 12, please fill in the next seat.  
 4 Juror No. 31, please move over to the other  
 5 side.  
 6 Juror No. 5, please move over to the other  
 7 side.  
 8 Juror No. 4, please move over to the other  
 9 side.  
 10 Juror No. 9, please move over to the other  
 11 side.  
 12 Juror No. 11, please move over to the other  
 13 side.  
 14 Juror No. 25, please take a seat on the other  
 15 side.  
 16 Juror No. 34, please take a seat on the other  
 17 side.  
 18 Juror No. 22, please take a seat on the other  
 19 side.  
 20 Juror No. 21, please take a seat on the other  
 21 side.  
 22 Juror No. 6, please take a seat on the other  
 23 side.  
 24 THE COURT: I think the front row is going to  
 25 have to condense somewhat.

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1 THE DEPUTY CLERK: Juror No. 24, please take a  
 2 seat on the other side.  
 3 Juror No. 14, please take a seat on the other  
 4 side.  
 5 Juror No. 20, please take a seat on the other  
 6 side.  
 7 Juror No. 3, please take a seat on the other  
 8 side.  
 9 THE COURT: We might have to move a third row  
 10 out.  
 11 Yes. Move the next row back and put them in  
 12 the last row in the other side. Thank you.  
 13 THE DEPUTY CLERK: Juror No. 10, please take a  
 14 seat on the other side.  
 15 THE COURT: If you are uncomfortable, you can  
 16 spread out a little bit, since I emptied the whole row  
 17 there.  
 18 Thank you very much.  
 19 (Silent striking process begins at 11:25 a.m.)  
 20 THE DEPUTY CLERK: Juror No. 23, please come  
 21 forward and take the first seat in the first row.  
 22 Juror No. 18, please come forward and take  
 23 the second seat in the first row.  
 24 Juror No. 12, please come forward and take the  
 25 next seat in the first row.